



Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Water Control Board
Virginia Administrative Code (VAC) citation	9 VAC25-260-5 et seq.
Regulation title	Nutrient criteria for the tidal James River
Action title	Amending existing tidal James River chlorophyll-a criteria in section 9VAC25-260-310.bb.
Date this document prepared	July 21, 2011

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of this rulemaking is to consider amending site specific numeric chlorophyll criteria for the tidal James River. The intent of this rulemaking is to protect designated and beneficial uses of the tidal James River by amending or adopting regulations that are technically correct, reasonable, and necessary. These standards will be used in setting Virginia Pollutant Discharge Elimination System Permit limits and for evaluating the waters of the Commonwealth for inclusion in the Clean Water Act 305(b) report and on the 303(d) list. Amending the chlorophyll criteria for the tidal James River may result in amending that portion of the December 2010 Chesapeake Bay Total Maximum Daily Load allocations for nitrogen, phosphorus, and sediment in the James River basin.

This rulemaking is warranted given the addition of new information related to algal communities and their relationship to designated and beneficial use. The goals of the new or amended regulation will be to ensure protection of designated and beneficial uses of the tidal James River through the best science and regulatory approaches.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly

chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Federal and state mandates in the Clean Water Act (CWA) at 303(c), 40 CFR 131 and the Code of Virginia in §62.1-44.15(3a) are the sources of legal authority identified to promulgate these amendments. The most relevant law is the Code of Virginia at §62.1-44.15(3a). The promulgating entity is the State Water Control Board (Board).

The scope and purpose of the CWA is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. The CWA 303(c)(1) requires that the states hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards.

The scope of the Federal regulations at 40 CFR 131 is to describe the requirements and procedures for developing, reviewing, revising and approving water quality standards by the States as authorized by section 303(c) of the CWA 40 CFR 131 specifically requires the states to adopt criteria to protect designated uses.

The scope and purpose of the State Water Control Law is to protect and to restore the quality of state waters, to safeguard the clean waters from pollution, to prevent and to reduce pollution and to promote water conservation. The State Water Control Law (Code of Virginia) at §62.1-44.15(3a) requires the Board to establish standards of quality and to modify, amend or cancel any such standards or policies. It also requires the Board to hold public hearings from time to time for the purpose of reviewing the water quality standards, and, as appropriate, adopting, modifying or canceling such standards.

The correlation between the proposed regulatory action and the legal authority identified above is that criteria and designated uses are requirements of the Water Quality Standards and the amendments being considered are modifications of criteria that will protect designated uses.

The authority to adopt standards is mandated, although the specific standards to be adopted or modified are discretionary to the Environmental Protection Agency and the state.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

The rulemaking is essential to the protection of health, safety or welfare of the citizens of the Commonwealth. Proper water quality standards protect water quality and living resources of Virginia's waters for consumption of fish and shellfish, recreational uses and conservation in general.

The 2010 Chesapeake Bay Total Maximum Daily Load developed by the US Environmental Protection Agency (EPA) resulted in a nutrient load cap for the James River basin much more restrictive than those used in establishing the existing chlorophyll standard adopted in 2005. The Department needs to verify the current standards and subsequent loads are technically correct, necessary, and reasonable. Meeting those load caps is estimated to add \$1-2 billion beyond what was considered needed when the current standard was developed and adopted in 2005. Approaches for addressing excess nutrients have evolved since 2005 and the Department feels there is sufficient new science and data available since 2005 and also intends to conduct several years of new research and study to assure appropriate standards for the tidal James River so those standards reflect the best available science and regulatory approaches. The

exact nature of the rulemaking will be determined by the findings of this review of the current criteria and subsequent study.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.

A scientific study will be conducted to review the current chlorophyll criteria at section 9VAC25-260-310.bb for the tidal James River. Based on the additional monitoring and other scientific analysis that will be conducted, completion of the study is currently expected during 2015. This rulemaking process will continue if it is determined through the scientific study that further consideration of a change to the existing regulation is warranted.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

One alternative is to keep the current water quality standard regulation unchanged without further study. This was not chosen since, as mentioned in the "Need" section, recent TMDL model predictions propose lower nutrient caps which could result in increases in treatment costs significantly beyond those originally considered during development of the current standard. This new concern with the implementation of the current standard, combined with the existence of additional recent information, has prompted this review of the existing chlorophyll criteria. The Department has formed a science advisory panel to assist in developing and implementing a comprehensive multi-year study of the existing James River Site-Specific Numeric Chlorophyll criteria and associated modeling framework. This study will involve review of technical information available since 2005 as well as new data collection and algal modeling. Other alternatives for chlorophyll criteria are expected to be identified during the course of the study and will be presented to the Department for consideration.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments on this notice.

The Department is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives, 3) potential impacts of the regulation and 4) impacts of the regulation on farm and forest land preservation. The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected

small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to David C. Whitehurst, VA Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218; Phone: 804-698-4121; Fax: 804-698-4116; Email: David.Whitehurst@deq.virginia.gov. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: www.townhall.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by DEQ by the close of the public comment period.

Public Hearing at Proposed Stage

A public hearing will be held after publication of the proposed stage of the regulatory action.

Regulatory Panel

Please indicate, to the extent known, if advisers (e.g., regulatory advisory panel or negotiated rulemaking panel) will be involved in the development of the proposed regulation. Indicate that 1) the agency is not using a panel in the development of the proposal; 2) the agency is using a panel in the development of the proposal; or 3) the agency is inviting comment on whether to use a panel to assist the agency in the development of a proposal.

The Board is using a panel to develop a proposal. Persons interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). The primary function of the panel is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Multi-applications from a single company, organization, group or other entity count as one for purposes of making the decision specified in the preceding sentence. Notification of the composition of the panel will be sent to all applicants.

Time Frame of Rulemaking

As indicated in the Substance section above, a scientific study will be conducted and if it is determined through the study that further consideration of a change to the existing regulation is warranted, the rulemaking process will continue. As a result, it is expected that this rulemaking will take longer to complete than the standard rulemaking timeframes provided for in the Governor's Executive Order No. 14 (2010) allow. Therefore, a waiver to the timeframe requirements was requested and has been received. Receipt of the waiver allows the components of the study to be completed as part of the development of a proposed regulatory action to amend the existing regulation.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights

of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The direct impact resulting from the development of water quality standards is for the protection of public health and safety and the protection of water quality in surface waters which has only an indirect impact on families.